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BEFORE THE ARIZONA CORPORATION COMMISSION

1
2 RENEZ D. JENNINGS
CHAIRMAN
3 MARCIA WEEKS
COMMISSIONER
4 DALE H. MORGAN
COMMISSIONER

5
6 IN THE MATTER OF THE APPLICATION OF)
THE MOUNTAIN STATES TELEPHONE AND)
TELEGRAPH COMPANY FOR DEREGULATION AND)
7 THE WITHDRAWAL OF FILED TARIFFS RELATING)
TO THE MOBILE RADIO COMMON CARRIER)
8 INDUSTRY WITHIN THE STATE OF ARIZONA.)

DOCKET NO. 1-1051-86-016

DECISION NO. 56314

OPINION AND ORDER
Phase II

9
10 DATES OF HEARING: September 8 (Prehearing Conference) and
September 15 and 16, 1988.
11 PLACE OF HEARING: Phoenix, Arizona
12 PRESIDING OFFICER: Jerry L. Rudibaugh
13 APPEARANCES: WINSTON & STRAWN, by Michael M. Grant, Attorneys
for NewVector Communications, Inc. and TuCell
14 Limited Partnership;
15 SNELL & WILMER, by Bruce P. White, and FLEISCHMAN
16 AND WALSH, P.C., by R. Stephen Berry, Attorneys
for Metro Mobile CTS of Phoenix, Inc., Metro
17 Mobile CTS of Tucson, Inc. and Tucson Cellular
Telephone Company;
18 ROBERT J. MEYERS, Staff Attorney for Residential
Utility Consumer Office;
19 EVANS, KITCHEN & JENCKES, P.C., by Richard L.
20 Sallquist, Attorneys for Citizens Utilities
Company and Citizens Utilities Rural Company,
21 Inc., and William T. Lynam, Staff Attorney for
Citizens Utilities Company and Citizens Utilities
22 Rural Company, Inc.; and
23 RONALD R. EVANS, Attorney and President, Southwest
Cellular Company
24 CYNTHIA J. HAGLIN, Attorney, Legal Division, for
25 the Arizona Corporation Commission Staff.

26 BY THE COMMISSION:

27 On January 20, 1986, The Mountain States Telephone & Telegraph Company
28 ("Mountain Bell") filed a Petition for Deregulation ("Petition") of its radio

1 telephone services and the withdrawal of all tariffs relating thereto with the
2 Arizona Corporation Commission ("Commission"). Said Petition was filed
3 pursuant to the procedure set forth in A.R.S. §40-281(E).

4 On October 1, 1986, the Commission's Utilities Division Staff ("Staff")
5 filed a Motion to expand the docket to include a review of all radio common
6 carrier ("RCC") services provided by either telephone companies or RCC's within
7 Arizona. There was no opposition to this Motion which was served on all
8 telephone companies and RCC's having authority from this Commission. By
9 Procedural Order dated November 18, 1986, Staff's Motion was granted. All
10 telecommunication companies authorized to provide RCC services were deemed as
11 intervenors in this matter and were given notice of the proceeding.

12 On March 13, 1987, Staff filed a Motion to Exclude Cellular Services
13 ("Motion to Exclude") from the docket or in the alternative continue the
14 hearing date for a minimum period of 120 days. In its March 17, 1987 Response,
15 U.S. West NewVector Group and TuCell Partnership (collectively "New Vector")
16 opposed Staff's Motion to Exclude but supported the alternative Motion to
17 Continue the hearing date. We note that Metro Mobile CTS of Phoenix, Inc., and
18 Metro Mobile CTS of Tucson, Inc. (collectively "Metro Mobile"), also supported
19 a continuance.

20 At the prehearing conference held at the Commission's offices in Phoenix,
21 Arizona, on March 19, 1987, the Presiding Officer granted Staff's Motion to
22 Exclude as to the March 24, 1987 hearing date. At the same time, the Presiding
23 Officer bifurcated the hearing into two distinct phases. The March 24, 1987
24 hearing was designated as Phase I in this matter and would involve mobile radio
25 common carrier services. Cellular services were specifically excluded from
26 Phase I and were the subject of a Phase II hearing. Each of the Phases will
27 have its own separate Order.

28 An evidentiary hearing was held on Phase I at the Commission's offices on

1 March 24, 1987. Mountain Bell, U.S. Sprint Communications Company ("Sprint"),
2 Citizens Utilities Company and Citizens Utilities Rural Company, Inc.
3 "Citizens"), Arizona Radio Common Carrier Association ("Association"),
4 NewVector, and Staff appeared through counsel. At the conclusion of a full
5 public hearing, this matter was adjourned pending submission of a Recommended
6 Opinion and Order by the Presiding Officer to the Commission. The Commission
7 issued Decision No. 55633 (July 2, 1987), for Phase I in this matter.

8 An evidentiary hearing was held on Phase II at the Commission's offices on
9 September 15 and 16, 1988. NewVector, Metro Mobile, Citizens, Southwest
10 Cellular Company ("Southwest"), Arizona Residential Utility Consumer Office
11 ("RUCO"), and Staff appeared through counsel. At the conclusion of a full
12 public hearing, this matter was adjourned pending submission of a Recommended
13 Opinion and Order by the Presiding Officer to the Commission.

14 Discussion

15 Cellular radio service is a relatively new service which generally
16 provides higher quality transmissions and has a greater system capacity than
17 mobile radio communications. In the early 1980's, the Federal Communications
18 Commission ("FCC") determined that there was a need for nationwide cellular
19 service. The FCC has divided the country into 305 metropolitan statistical
20 areas ("MSA's") and 428 rural service areas ("RSA's"). The FCC has also
21 determined that the market structure will be that of a duopoly subject to
22 universal resale of the two primary carriers. One of the licenses was reserved
23 for the basic telephone exchange company or its affiliate and the other was to
24 be given to a private non-wire line applicant. All of the licenses for the
25 MSA's have been granted while, to date, none of the licenses for the RSA's have
26 been granted.

27 In Arizona, only the metropolitan Phoenix and Tucson areas have cellular
28 systems. The Commission in Decision No. 53740, dated September 14, 1983,

1 granted the initial Certificate of Public Convenience and Necessity ("CC&N") to
2 operate a "cellular radio communications, (telephone) system" within the
3 Phoenix MSA to NewVector's predecessor Advanced Mobile Phoenix Service, Inc.
4 ("AMPS").

5 The following Findings of Fact Nos. 1, 5, and 13 as well as Conclusion of
6 Law No. 3 were extracted from Decision No. 53740:

7 1. AMPS is a Delaware corporation which proposes to engage in
8 the business of providing cellular radio communications as a
9 common carrier within the Phoenix, Arizona Standard Metropolitan
10 Statistical Area ("SMSA")

11 5. Market research has indicated considerable demand for
12 improved radio telephone service in the Phoenix area

13 13. The FCC has previously found that a public need exists for
14 cellular radio service throughout the country, including
15 Phoenix, and that AMPS is a fit and able party to provide such
16 service

17 3. There exists a public necessity for a cellular radio
18 communications system within the Phoenix, Arizona SMSA.

19 The Commission issued its second CC&N for the Phoenix area to Metro Mobile
20 CTS of Phoenix, Inc. in Decision No. 54231, dated November 8, 1984. The
21 following Findings of Fact Nos. 6 and 7 and Conclusion of Law Nos. 1, 2 and 3
22 are extracted from Decision No. 54231:

23 6. The FCC has previously found that a public need exists for
24 cellular service throughout the country, including Phoenix, and
25 that Metro Mobile is a fit and able party to provide such
26 service.

27 7. In Decision No. 53740, the Commission expressly found that
28 there was a great unsatisfied need for additional radio
telephone service in the Phoenix SMSA.

1. Metro Mobile CTS of Phoenix, Inc., is a public service
corporation within the meaning of Article XV of the Arizona
Constitution and a telephone corporation within the meaning of
A.R.S. §40-281.

2. The Commission has jurisdiction over Metro Mobile and of
the subject matter of the Application herein.

3. There exists a public necessity for a second provider of
cellular radio communication service within the Phoenix,
Arizona, SMSA.

On February 14, 1985, the initial CC&N for the Tucson area was granted in Decision No. 54377 to TuCell Limited Partnership and the second CC&N for the Tucson area was granted in Decision No. 54758, dated November 13, 1985, to Tucson Cellular Telephone Company. The following Findings of Fact No. 8 and Conclusions of law Nos. 1 and 3 were extracted from Decision No. 54377:

8. The FCC has determined that need for cellular communications services exists on a nationwide basis. Cellular Communications Systems, 86 FCC 2d 469 (1981) and Cellular Reconsideration Order, 89 FCC 2d 58 (1982). (That issue may, therefore, have been preempted in state certification proceedings; see also ACC Decision No. 53740 @ p.5). Market research has indicated considerable demand in the Tucson area for the type of communications service contemplated by TuCell and presently not being provided by anyone else.

1. TuCell is a public service corporation within the meaning of Article XV of the Arizona Constitution and a telephone corporation within the meaning of A.R.S. §40-281.

3. There exists a public necessity for a cellular radio/telephone communications system within the Tucson, Arizona SMSA.

The primary advocate for deregulation in Phase II was NewVector. Much of their testimony dwelled on Decision No. 55633 (Phase I Decision) in which the Commission concluded that providers of mobile radio common carrier services were not public service corporations pursuant to Article XV of the Arizona Constitution and A.R.S. §40-281. According to NewVector, cellular systems are direct competitors of mobile radio common carrier services. NewVector argued that from the consumer's standpoint, each of the systems provide the same basic two way mobile communications capability which is tied into the basic land-line telephone system. Furthermore, the cellular system is not essential or integral to basic access service. We note that A.R.S. §40-281(E) provides as follows:

...

...

1 When the commission determines after notice and hearing that any
2 product or service of a telecommunications corporation is
3 neither essential nor integral to the public service rendered by
4 such corporation, it shall declare that such product or service
5 is not subject to regulations by the commission (emphasis added)

6 NewVector also expressed concern that some of the recommendations offered
7 by others to regulate cellular in rural areas but deregulate in urban areas
8 could result in pragmatic problems as well as confusion for consumers. In
9 addition, NewVector indicated that a similar recommendation was already
10 rejected by the Commission in its Phase I decision. However, in order to
11 alleviate some of the fears expressed by others, NewVector recommended the
12 following language be included in the Decision:

13 Our Decision today is premised upon our understanding that
14 cellular systems provide basically mobile service with some
15 incidental fixed use. It is without prejudice to our ability
16 potentially to inquire into and require licensing and regulation
17 of cellular systems wherever located designed primarily for
18 fixed use.

19 Metro Mobile argued that cellular has limited competition both because of
20 its superiority over various mobile radio services as well as the FCC
21 limitation of two cellular carriers per statistical area. As a result, Metro
22 Mobile's primary recommendation was for the Commission to delay its decision in
23 this matter until after the decision of the United States Court of Appeals for
24 the Ninth Circuit in Metro Mobile CTS of Phoenix, Inc. vs. NewVector
25 Communications, Inc., No. 87-2242. According to Metro Mobile, the
26 aforementioned Ninth Circuit decision will determine the extent the antitrust
27 laws apply to the Arizona wholesale cellular markets. If it's determined that
28 the antitrust laws do not apply and the Commission also approves deregulation,
then Arizona consumers could be left with no protection from anticompetitive
activities.

Citizens argued that the "neither essential nor integral" exemption of
A.R.S. §40-281(E) does not apply in this case. According to Citizens, the

1 public service being provided is public telephone service which pursuant to the
2 Arizona Constitution is to be regulated by the Commission. In addition,
3 Citizens argued that it could be a disaster to completely deregulate a fast
4 growing part of our basic telephone service. According to Citizens Exhibit No.
5 1, NewVector has experienced rapid growth in revenues (sales) in both its
6 Phoenix and Tucson markets. NewVector's 1985 Phoenix revenues increased over
7 its 1984 revenues by 550% (from \$1,451,000 to \$9,408,769) and its 1986 Tucson
8 revenues increased over its 1985 revenues by 450% (from \$250,962 to
9 \$1,366,406).

10 RUCO recommended that cellular phone service in rural areas not be
11 deregulated based on the following reasons:

- 12 1. The Commission lacks a basis for concluding that
13 deregulation of rural mobile cellular service is in the
14 public interest;
- 15 2. Mobile cellular service may be the only means of providing
16 basic telephone service to some rural areas;
- 17 3. Effective competition does not exist; and,
- 18 4. Alternate mobile radio services do not offer effective
19 competition.

20 Since cellular service is not currently being provided in rural areas,
21 RUCO argued there was no evidence from which to conclude there is no public
22 interest. In fact, cellular phone service could supplant local land-line
23 service in some areas.

24 Staff recommended that wholesale cellular service be deregulated in the
25 metropolitan Phoenix and Tucson areas. Staff made its recommendation after
26 analyzing the following factors which were discussed in Decision No. 55633:

- 27 1. The separability of the service in question from the
28 public telecommunications network;
2. The proportion of the public which subscribes to the
service;
3. The degree to which the service is obtained through

private contract;

- 4) The degree to which the service serves only very specialized needs;
- 5) The impact of deregulation on the rates charged for the deregulated service and on other regulated services; and,
- 6) Competition in the provision of the service.

Staff determined that wholesale cellular service in the Phoenix and Tucson areas passed all the above criteria which support deregulation. As a result, Staff concluded that wholesale mobile cellular service in Phoenix and Tucson is neither essential nor integral to the provision of a public service pursuant to A.R.S. §40-281(E). Staff did not recommend deregulation of rural cellular service at this time since there was no information available to determine if such service would pass the tests utilized by Staff. In addition, Staff recommended the Commission continue to regulate cellular service for fixed applications within the metropolitan areas. Staff was concerned that if a larger percentage of customers used fixed cellular service, it could have an impact on basic land-line service.

Article XV, Section 2 of the Arizona Constitution defines a public service corporation as a corporation that transmits messages or furnishes telephone service. Consistent with that definition, A.R.S. §40-201 defines a "telecommunications corporation" as "a public service corporation other than municipal engaged in transmitting message or . . . telephone service in operating as a telecommunications common carrier." A.R.S. §40-281(E) limits the Commission's regulation of "any product or service of a telecommunications corporation" when it "is neither essential nor integral to the public service rendered . . .".

All parties were in agreement that the Commission should continue to regulate the interconnection between cellular carriers and the local exchange. We concur. It is also clear in this matter that NewVector and Metro Mobile are

1 "transmitting messages or furnishing..." telephone service pursuant to Article
2 XV of the Arizona Constitution. After careful review of the record, we find
3 the major issue in this matter is whether or not cellular telephone service is
4 a public service. If it is a public service, then the "neither essential nor
5 integral to the public service rendered" provision of A.R.S. §40-281(E) would
6 make absolutely no sense to apply in this case.

7 Both Staff and New Vector concluded there was no public interest in
8 cellular telephone service¹. In general, both reached their conclusion
9 primarily because of the alleged small percentage of the general population
10 which subscribe to cellular service in spite of its widespread metropolitan
11 availability. According to NewVector, only about .42% of the statewide
12 population has subscribed to NewVector's cellular service. Staff did not
13 ascertain a percentage of the general population using cellular, but instead
14 focused on the percentage of businesses in the Phoenix and Tucson areas which
15 have subscribed to cellular service. Staff estimated
16 that as many as 41%² of the Phoenix and Tucson businesses would be utilizing
17 cellular service by the end of 1988. In Decision No. 55633, the Commission
18 concluded there was no public interest in mobile communications since only .07%
19 subscribed despite its widespread availability. We are unable to reach the
20 same conclusion in this matter for several reasons. First, the percentage of
21 cellular users is almost six times higher than mobile communication users even
22 though cellular has not been offered statewide. In addition, cellular has been
23 offered in Phoenix and Tucson for only a relatively short time frame. Hence, .

24 . . .

- 25 _____
- 26 1. As previously mentioned, Staff made a distinction between mobile and fixed
27 service and metropolitan and rural service.
28 2. Staff was unable to arrive at a precise number because the information was
not available from NewVector and Metro Mobile.

1 there is not sufficient evidence to conclude there is no public interest. In
 2 fact, the evidence strongly supports the opposite. Clearly, in Decision No.
 3 53740 the Commission concluded that NewVector's predecessor was a public
 4 service corporation. In reaching that conclusion, the Commission found that
 5 there was a public need and necessity for cellular phone service. Subsequent
 6 to that Decision, the growth in cellular as reflected by Citizens Exhibit No. 1
 7 has been phenomenal. Hence, we must conclude that the public interest, if
 8 anything, has grown since Decision No. 53740. In addition, the downward trend
 9 in prices as well as the expansion into rural areas will undoubtedly result in
 10 further increasing public interest in cellular. Based on all the above, we
 11 find that NewVector and Metro Mobile do transmit messages to the public
 12 pursuant to Article XV, Section 2. Further, although there was some evidence
 13 indicating that presently the majority of users are business and professional
 14 people, we are not convinced that there is not a general public interest in
 15 cellular service at this time. However, the Commission will continue to
 16 monitor the public interest in cellular as the service is expanded throughout
 17 the State.

18 The continued regulation of NewVector and Metro Mobile will alleviate the
 19 concerns expressed by RUCO, Staff, and Citizens regarding service into rural
 20 areas. Similarly, Staff's concerns with regulating of fixed cellular
 21 telephones will also be taken care of without the potential administrative
 22 nightmare of distinguishing between "fixed" mobile cellular and "mobile" fixed
 23 cellular.

24 * * * * *

25 Having considered the entire record herein and being fully advised in the
 26 premises, the Commission finds, concludes, and orders that:

27 . . .

28 . . .

FINDINGS OF FACT

1
2 1. Mountain Bell is a Colorado corporation engaged in providing
3 telephone and other telecommunication service to the public within Arizona.

4 2. On January 20, 1986, Mountain Bell filed a Petition for Deregulation
5 of its radio telephone services and the withdrawal of all tariffs relating
6 thereto with the Commission.

7 3. On October 1, 1986, Staff filed a Motion to expand the docket to
8 include a review of all RCC services provided by either telephone companies or
9 RCC's within Arizona.

10 4. By Procedural Order dated November 18, 1986, Staff's Motion was
11 granted, and all telecommunications companies authorized to provide RCC
12 services were deemed intervenors and given notice of the proceeding.

13 5. This matter has been bifurcated into two distinct phases, with Phase
14 I involving mobile radio common carrier services and Phase II involving
15 cellular services.

16 6. A hearing on Phase I of this matter was held on March 24, 1987.

17 7. On July 2, 1987, the Commission issued Decision No. 55733 on Phase I
18 of this matter.

19 8. By Procedural Order dated March 27, 1987, and as amended on July 15,
20 1987, October 9, 1987, January 15, 1988, and May 19, 1988, all the parties in
21 support of the Petition for Deregulation in Phase II of this matter were
22 ordered to file testimony and exhibits on or before August 8, 1988.

23 9. NewVector is an Arizona corporation engaged in providing cellular
24 telephone service within Arizona pursuant to a Certificate granted by this
25 Commission in Decision Nos. 53740 and 53864.

26 10. On August 8, 1988, NewVector filed testimony and exhibits in support
27 of the Petition of Deregulation in Phase II of this matter.

28 11. Cellular is a relatively new telephone service technology.

12. The Commission concluded in Decision Nos. 53740 and 53864 that there was a public interest in cellular services within Arizona.

13. There has been substantial growth in the number of users of cellular services since issuance of Decision Nos. 53740 and 53864 even though service is presently only provided in the Tucson and Phoenix MSA's.

14. Cellular services will be offered in additional areas of the State in the near future.

CONCLUSIONS OF LAW

1. NewVector is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §40-281.

2. NewVector is a telecommunications corporation within the meaning of A.R.S. §§40-201(10) and 40-281.

3. Providers of cellular telephone services are public service corporations pursuant to Article XV of the Arizona Constitution and A.R.S. §40-281.

4. Mountain Bells' petition as supported by NewVector in Phase II of this matter should be denied.

ORDER

IT IS THEREFORE ORDERED that the Petition to Deregulate cellular telephone services as supported by NewVector Communications, Inc., hereby is denied.

21 . . .
22 . . .
23 . . .
24 . . .
25 . . .
26 . . .
27 . . .
28 . . .

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 12 day of January, 1989.

JAMES MATTHEWS

Executive Secretary

DISSENT

JLR/djp

APPENDIX #2

ARTICLE XV

THE CORPORATION COMMISSION

Sec.

1. Composition; election; term of office; office and residence; vacancies; qualifications.
2. "Public service corporations" defined.
3. Power of commission as to classifications, rates and charges, rules, contracts, and accounts; local regulation.
4. Power to inspect and investigate.
5. Power to issue certificates of incorporation and licenses.
6. Enlargement of powers by legislature; rules and regulations.
7. Connecting and intersecting lines of transportation and communications corporations.
8. Transportation by connecting carriers.
9. Transmission of messages by connecting carriers.
10. Railways as public highways; other corporations as common carriers.
11. Movable property as personal property; liability of property to attachment, execution and sale.
12. Charges for service; discrimination; free or reduced rate transportation.
13. Reports to commission.
14. Value of property of public service corporations.
15. Acceptance of constitutional provisions by existing corporations.
16. Forfeitures for violations.
17. Appeal to courts.
18. Repealed.
19. Power to impose fines.

Cross References

Corporation commission in general, see A.R.S. § 40-101 et seq.

Library References

Carriers § 1, 8.	C.J.S. Carriers § 15 et seq.
Public Service Commissions § 141 et seq.	C.J.S. Public Utilities § 60 et seq.

§ 1. Composition; election; term of office; office and residence; vacancies; qualifications

Section 1. A Corporation Commission is hereby created to be composed of three persons, who shall be elected at the general election to be held under the provisions of the Enabling Act approved June 20, 1910, and whose term of office shall be co-terminous with that of the Governor of the State elected at the same time, and who shall maintain their chief office, and reside, at the State Capital. At the first general State election held under this Constitution at which a Governor is voted for, three commissioners shall be elected who shall, from and after the first Monday in January next succeeding said election, hold office as follows:

The one receiving the highest number of votes shall serve six years, and the one receiving the second highest number of votes shall serve

Art. 15 § 1

CONSTITUTION OF ARIZONA

four years, and the one receiving the third highest number of votes shall serve two years. And one commissioner shall be elected every two years thereafter. In case of vacancy in said office, the Governor shall appoint a commissioner to fill such vacancy. Such appointed commissioner shall fill such vacancy until a commissioner shall be elected at a general election as provided by law, and shall qualify. The qualifications of commissioners may be prescribed by law.

Cross References

General elections, see A.R.S. § 16-913.

Organization, meetings and acts of commission, see A.R.S. § 40-102.

Qualifications of commissioners, see A.R.S. § 40-101.

Notes of Decisions

In general 1
Definitions 2
Vacancies 3

1. In general

Candidate elected to office of corporation commissioner at special election was not entitled to office as against incumbent appointed by governor on resignation of former commissioner, since corporation commissioner can be elected only at general election. *Hudson v. Cumppard* (1934) 44 Ariz. 7, 33 P.2d 591.

2. Definitions

As regards A.R.S. § 40-254 providing that a party may "commence an action in the superior court of the county in which the commission has its office", word "office" means the principal or chief office of the corporation commission, and, therefore, the only superior court having jurisdiction to review an order of the corporation commission is the Maricopa county superior court. *City of Show Low v. Owens* (App. 1980) 127 Ariz. 266, 619 P.2d 1043.

Word "law" within this section providing that on vacancy of office of corporation commissioner Governor shall appoint commissioner to fill vacancy until commissioner shall be elected at general election as provided by law, means either Constitution or statute passed by authority thereof. *Hudson v. Cumppard* (1934) 44 Ariz. 7, 33 P.2d 591.

3. Vacancies

Under provision of this section authorizing governor to appoint a commissioner to fill a vacancy in office of corporation commission and stating that such appointed commissioner shall fill such vacancy until a commissioner shall be elected at a general election as provided by law, appointment by governor of a commissioner to fill a vacancy created by death of a member having more than two years remaining of his term was only until next general election closest in point of time after vacancy occurred, not for the unexpired term of deceased commissioner. *Bolin v. Superior Court In and For Maricopa County* (1959) 85 Ariz. 131, 333 P.2d 295.

§ 2. "Public service corporations" defined

Section 2. All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Amendment approved election Nov. 5, 1974, eff. Dec. 5, 1974; election Nov. 4, 1980, eff. Nov. 24, 1980.

Art. 15 § 2

Note 7

Services, Inc. v. Corporation Commission (1966) 2 Ariz.App. 559, 410 P.2d 677.

Garbage haulers were excluded from provisions of A.R.S. § 40-641 (repealed), which imposed a license tax upon motor carriers. Op.Atty.Gen. No. 65-1.

Arizona corporation commission does have jurisdiction over privately-owned garbage collection services. Op.Atty.Gen. No. 58-80.

8. Railroads

Use of state funds or facilities to subsidize rail passenger service through the Amtrak system is not prohibited by Const. Art. 9, § 7 prohibiting the state or a subdivision of the state from giving or loaning its credit or making any donation or grant to any corporation or by provision of Const. Art. 9, § 10 that no tax is to be laid or appropriation of public money made in aid of any public service corporation where major purpose of the program involved was to provide transportation for the public through a federally-controlled and operated profit organization, and any benefit to the Amtrak system was purely incidental. Op. Atty.Gen. No. 181-003.

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In regard to sale of securities, provision of A.R.S. § 44-1843, par. 5 exempting securities issued or guaranteed either as to principal, interest or dividend by a railroad or public utility, public service corporations were exempt. Op.Atty.Gen. No. 59-24.

9. Motor clubs

Legislature cannot vest in the corporation commission regulatory powers over motor clubs, and statutes that purport to do so are unconstitutional, because motor clubs are not enumerated in the constitution of Arizona as entities subject to regulation by the commission. Op.Atty.Gen. No. 183-015.

10. Sewage disposal corporations

Sewage disposal corporations are not "public service corporations", as that term is used in Const. Art. 15, § 10. Op.Atty. Gen. No. 70-1-L.

Sewage disposal corporations could be declared to be public service corporations and, thereby, subject to control of rates, charges, and conditions of service, as are existing public service corporations, only by constitutional amendment. Id.

§ 3. Power of commission as to classifications, rates and charges, rules, contracts, and accounts; local regulations

Section 3. The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission.

THE CORPORATION COMMISSION

Art. 15 § 4

Note 1

25. Cooperative utilities

Cooperative utilities are subject to jurisdiction of state corporation commission. Op. Atty. Gen. No. 61-43.

Cooperative utility must receive a certificate of convenience and necessity from

state corporation commission prior to providing utility service to its customers, and, if the cooperative's articles of incorporation indicate that its intent and purpose is to serve only its members, cooperative must be certified to serve only its members in the certain area. Id.

§ 4. Power to inspect and investigate

Section 4. The Corporation Commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the State, and for the purpose of the Commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the State. Said Commission shall have power to take testimony under commission or deposition either within or without the State.

Cross References

Investigation, hearing and appeal powers in general, see A.R.S. § 40-241 et seq.

Law Review Commentaries

Constitutional Convention of 1910. Ariz. State L.J. 1, 1978, p. 1.
Judicial review. 19 Ariz.L.Rev. 488 (1977).

Utility rate regulation, legal aspects of future tests period. Gail L. Gibbons, 16 Ariz.L.Rev. 947 (1974).

Notes of Decisions

In general 1
Expenditures 5
Express powers 2
Implied powers 3
Judicial powers 4
Sale of securities 6

1. In general

In the case of *Wylie v. Phoenix Assur. Co.* (1933) 42 Ariz. 133, 22 P.2d 845, the court said:

"Article 15 of the Constitution does not, in terms, confer on the corporation commission power to regulate the business of insurance like it does the business of public service corporations. The commission's power to regulate the insurance business, except to the limited extent indicated in sections 4 and 5 of said article, is statutory, chapter 36, Revised Code of 1928 (section

1773 et seq.), and receives its sanction under the police power of the state."

Const. Art. 14, §§ 8 and 17 and this section did not make corporations other than public service corporations subject in whole or in part to regulation by the corporation commission within Laws 1912, ch. 90, § 7 (A.R.S. § 40-101) forbidding commissioners owning stocks or bonds of corporations subject to such regulation. *State v. Jones* (1914) 15 Ariz. 215, 137 P. 544.

Only where additional evidence was brought to the attention of the corporation commission which contradicted information in a certificate filed pursuant to A.R.S. § 10-173 [repealed] could the commission further investigate or conduct hearings to determine whether three-fourths of the shareholders authorized the excess indebtedness at a lawfully held meeting and whether authorization of shareholders was in conformity with articles of incorporation

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and bylaws of the corporation. Op. Atty. Gen. No. 74-6.

2. Express powers

The corporation commission is authorized under this section to take testimony under commission or deposition either within or without the state; and the failure of provisions of this section to specify anything else which might be done out-of-state would be fatal to any hearings the commission might conduct outside Arizona. Op. Atty. Gen. No. 182-126.

The Arizona corporation commission has authority to refuse to issue certificate of incorporation to domestic corporation if transaction of an unlawful business is contemplated on the face of the articles of incorporation. Op. Atty. Gen. No. 72-11.

The Arizona corporation commission does not have authority to withhold the issuance of a certificate of incorporation to a domestic corporation, pending further inquiry by the commission to determine whether or not the transaction of an unlawful business is contemplated, if the commission has reason to think that the transaction of an unlawful business may be contemplated. Id.

The corporation commission, under its existing constitutional and statutory authority, cannot promulgate a general order which would bar persons convicted of certain felonies from holding office as directors or officers of domestic corporations or foreign corporations doing business in Arizona. Id.

3. Implied powers

The corporation commission's powers are not limited to those expressly granted by constitution, but commission may exercise all powers necessary or essential in performance of its duties. Garvey v. Trew (1946) 64 Ariz. 342, 170 P.2d 845, certiorari denied 67 S.Ct. 297, 329 U.S. 784, 91 L.Ed. 673.

The corporation commission has no implied powers and its powers do not exceed those to be derived from a strict construc-

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tion of the Constitution and implementing statutes. Commercial Life Ins. Co. v. Wright (1946) 64 Ariz. 129, 166 P.2d 943.

4. Judicial powers

No judicial power is vested in or can be exercised by the corporation commission unless that power is expressly granted by the constitution. Trico Elec. Co-op. v. Ralston (1948) 67 Ariz. 358, 196 P.2d 470.

The construction of an option agreement between public utility and electric cooperative for the purchase of electric transmission and distribution lines and facilities and all water distribution properties was a judicial function and the courts rather than the corporation commission have jurisdiction to determine validity of such agreement, although eventually the contract of sale, if valid, must have the sanction and approval of the corporation commission before it becomes effective. Id.

5. Expenditures

Legislature had right to make appropriation by Laws 1945, 1st S.S., Ch. 11 (repealed) to corporation commission for payment of federal power commission's expenses in making investigation, authorized by Ch. 11, to ascertain fair value of property of public service corporations furnishing gas or electricity as basis for rate-making. Garvey v. Trew (1946) 64 Ariz. 342, 170 P.2d 845, certiorari denied 67 S.Ct. 297, 329 U.S. 784, 91 L.Ed. 673.

6. Sale of securities

The corporation commission's specific constitutional power over sale of securities is limited to grant by this section of power to inspect and investigate, but the legislature may enlarge or extend the power and duties of the commission over the subject matter of which it has already been given jurisdiction and other matters of same class not expressly or impliedly exempt by other provisions of Constitution. Commercial Life Ins. Co. v. Wright (1946) 64 Ariz. 129, 166 P.2d 943.

§ 5. Power to issue certificates of incorporation and licenses

Section 5. The Corporation Commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this State, and to issue licenses to foreign corporations to do business in this State, except as insurers, as may be prescribed by law.

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Domestic and foreign insurers shall be subject to licensing, control and supervision by a department of insurance as prescribed by law. A director of the department of insurance shall be appointed by the Governor with the consent of the Senate in the manner prescribed by law for a term which may be prescribed by law.

Amendment approved election Nov. 5, 1968, eff. Jan. 28, 1969; election Nov. 2, 1976, eff. Nov. 22, 1976.

Historical Note

The governor, on January 28, 1969, proclaimed that the amendment of this section, as proposed by Laws 1968, S.C.R. No. 7, § 1, filed March 19, 1968, had been approved by a majority of the electors in the November 5, 1968 general election and had become law.

The 1969 amendment inserted "except as insurers," in the first paragraph; and added the second paragraph.

The governor, on November 22, 1976, proclaimed that the amendment of this section,

as proposed by Laws 1976, S.C.R. No. 1009, § 5, filed July 6, 1976, had been approved by a majority of the electors in the November 2, 1976 general election and had become law.

The 1976 amendment substituted "shall be appointed by the governor with the consent of the senate in the manner prescribed by law" for "shall be appointed by the governor subject to approval by the senate" in the second sentence of the second paragraph.

Cross References

Admission of foreign corporations for transaction of business in Arizona, see A.R.S. § 10-106 et seq.

Public service corporations, rate increases, see § 40-250.

Law Review Commentaries

Utility rate regulation, legal aspects of future tests period. Gail L. Gibbons, 16 Ariz.L.Rev. 947 (1974).

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1. In general

The Arizona corporation commission has authority to refuse to issue certificate of incorporation to domestic corporation if transaction of an unlawful business is contemplated on the face of the articles of incorporation. Op.Atty.Gen. No. 72-11.

The Arizona corporation commission does not have authority to withhold the issuance of a certificate of incorporation to a domestic corporation, pending further inquiry by the commission to determine whether or not the transaction of an unlawful business is contemplated, if the commission has reason to think that the transaction of an unlawful business may be contemplated. Id.

The corporation commission, under its existing constitutional and statutory authority, cannot promulgate a general order which would bar persons convicted of cer-

The Arizona corporation commission does not have authority to withhold the issuance of a license to a foreign corporation, pending further inquiry by commission to determine whether or not the transaction of an unlawful business is contemplated, if the commission has reason to think that the transaction of an unlawful business may be contemplated. Op.Atty.Gen. No. 72-11.

8. — Professional foreign corporations

State corporation commission lacks power to license foreign professional corporations. Op.Atty.Gen. No. 71-38.

9. — Debts, foreign corporations

Foreign business which had qualified to do business pursuant to A.R.S. § 10-481 et seq. (repealed; now A.R.S. § 10-106 et seq.) was not thereafter required to comply with provision of A.R.S. § 10-173 [repealed] regarding limitations on corporation indebtedness. Op.Atty.Gen. No. 73-22-L.

10. — Actions and proceedings involving foreign corporations

Act of director of insurance of Arizona in issuing certificate of authority to foreign corporation to transact business in Arizona

was act of corporation commission and foreign corporation was entitled to maintain action on indemnity agreements in federal court in Arizona although it had not obtained license from corporation commission directly. *Osborne v. Massachusetts Bonding & Ins. Co.* (D.C.1964) 229 F.Supp. 674.

11. Estoppel or laches

Certificates of public convenience and necessity can only be acquired from corporation commission by affirmative showing that issuance of certificate will best serve the public interest and not by estoppel or laches. *Walker v. De Concini* (1959) 86 Ariz. 143, 341 P.2d 933.

12. Mandamus

Mandamus is a proper remedy where Arizona corporation commission has clearly abused its discretion in refusing to accept for filing articles of incorporation, or amendments thereto, on ground that proposed corporate name is deceptively similar to name of other existing corporations; such remedy is not foreclosed by A.R.S. § 12-901 et seq., relating to judicial review of administrative decisions. *Senner v. Bank of Douglas* (1960) 88 Ariz. 194, 354 P.2d 48.

§ 6. Enlargement of powers by legislature; rules and regulations

Section 6. The law-making power may enlarge the powers and extend the duties of the Corporation Commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the Commission may make rules and regulations to govern such proceedings.

Cross References

Regulation of public service corporations by commission generally, see A.R.S. § 40-201 et seq.

Regulatory provisions relating to corporations generally, see A.R.S. § 10-007 et seq.

Law Review Commentaries

Constitutional Convention of 1910. Ariz. State L.J. 1, 1978, p. 1.

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7. — Constitutional amendment, commission powers

The November 25, 1980 amendment of Const. Art. 15, §§ 2 and 10 defining "public service corporations" and "common carriers" removed corporations engaged in carrying persons or property from the definitions of "common carrier" and "public service corporation" and, thus, from the constitutionally-based jurisdiction of the corporation commission, but, on question whether legislature could constitutionally direct the commission to continue to regulate motor carriers as common carriers and public service corporations after the amendment of the constitution in view of legislative intent to have commission continue the regulation until July 1, 1982 in accordance with Laws 1979, Ch. 203, § 15, commission should continue to exercise authority over common carriers until such time as a court might otherwise direct. Op. Atty. Gen. No. 181-019.

8. — Implied commission powers

Corporation commission of Arizona has no implied powers. *Kendall v. Malcolm* (1965) 98 Ariz. 329, 404 P.2d 414.

9. Judicial functions

When it rules on applications for certificates of public convenience and necessity, corporation commission performs a judicial function. *Walker v. De Concini* (1959) 86 Ariz. 143, 341 P.2d 933.

The construction of an option agreement between public utility and electric co-operative for the purchase of electric transmission and distribution lines and facilities and all water distribution properties was a judicial function and the courts rather than the corporation commission have jurisdiction to determine validity of such agreement, although eventually the contract of sale, if valid, must have the sanction and approval of the corporation commission before it becomes effective. *Trico Elec. Co-op. v. Ralston* (1948) 67 Ariz. 358, 196 P.2d 470.

§ 7. Connecting and intersecting lines of transportation and communications corporations

Section 7. Every public service corporation organized or authorized under the laws of the State to do any transportation or transmission business within the State shall have the right to construct and operate lines connecting any points within the State, and to connect at the State

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10. Rules and regulations, in general

State corporation commission had authority to make reasonable rules and regulations and orders governing private carriers of passengers and property, i.e., any person not included in term "common motor carrier" or "contract motor carrier" who transports by vehicle in excess of 6,000 pounds unladen weight property of which such person is owner, lessee or bailee, when such transportation is for purpose of sale, lease, rent, or bailment or in furtherance of any commercial enterprise, but authority to regulate would not extend to passengers. Op. Atty. Gen. No. 61-45.

State corporation commission had authority to make reasonable rules, regulations, and orders governing contract carriers of passengers and property. *Id.*

State corporation commission had jurisdiction to require private motor carriers to comply with commission's general orders relative to safety requirements. Op. Atty. Gen. No. 59-66.

11. Municipal operation of business

Corporation commission lacks jurisdiction over a municipality in regard to municipality's determination of what fields of business, including public utilities, it will enter and over question of feasibility, desirability, or consideration to be paid by municipality in regard to acquisition or purchase of public utilities. Op. Atty. Gen. No. 62-7.

12. Violation of commission orders

Upon violation of corporation commission's general orders, complaint could be secured from county attorney charging that motor carrier was in violation and guilty of a misdemeanor or commission's rules and regulations could be enforced by filing a criminal complaint charging a misdemeanor pursuant to A.R.S. § 40-660 [repealed], and commission could also fine anyone violating its rules by citing any violation before the commission for contempt and by collecting, in a civil action, any fine assessed. Op. Atty. Gen. No. 59-61.

boundaries with like lines; and every such corporation shall have the right with any of its lines to cross, intersect, or connect with, any lines of any other public service corporation.

Cross References

Connecting services and facilities between companies, see A.R.S. § 40-325 et seq.

Law Review Commentaries

Power plant and transmission line siting,
improving Arizona's legislative approach.
Law & Soc. Order, 1973, p. 519.

§ 8. Transportation by connecting carriers

Section 8. Every public service corporation doing a transportation business within the State shall receive and transport, without delay or discrimination, cars loaded or empty, property, or passengers delivered to it by any other public service corporation doing a similar business, and deliver cars, loaded or empty, without delay or discrimination, to other transportation corporations, under such regulations as shall be prescribed by the Corporation Commission, or by law.

Cross References

Connecting services and facilities between companies, see A.R.S. § 40-325 et seq.

Notes of Decisions

1. In general

This section, authorizing the legislature to exercise its authority in the formulation of regulations to govern the interchange by transportation companies of cars, property, and passengers, and Const. Art. 15, § 9, containing a similar provision in regard to

telegraph and telephone companies, do not limit the full power given by Const. Art. 15, § 3 to the corporation commission to fix rates, charges, and classifications for public utilities. *State v. Tucson Gas, Electric Light & Power Co.* (1914) 15 Ariz. 294, 138 P. 781.

§ 9. Transmission of messages by connecting carriers

Section 9. Every public service corporation engaged in the business of transmitting messages for profit shall receive and transmit, without delay or discrimination, any messages delivered to it by any other public service corporation engaged in the business of transmitting messages for profit, and shall, with its lines, make physical connection with the lines of any public service corporation engaged in the business of transmitting messages for profit, under such rules and regulations as shall be prescribed by the Corporation Commission, or by law; Provided, that such public service corporations shall deliver messages to other such corporations, without delay or discrimination, under such rules and regulations as shall be prescribed by the Corporation Commission, or by law.

§ 11. Movable property as personal property; liability of property to attachment, execution and sale

Section 11. The rolling stock and all other movable property belonging to any public service corporation in this State, shall be considered personal property, and its real and personal property, and every part thereof, shall be liable to attachment, execution, and sale in the same manner as the property of individuals; and the law-making power shall enact no laws exempting any such property from attachment, execution, or sale.

Cross References

Attachment, generally, see A.R.S. § 12-1521 et seq.

Execution of judgments, generally, see A.R.S. § 12-1551 et seq.

Liability to persons for injury resulting from violations, see A.R.S. § 40-423.

Sales under execution, generally, see A.R.S. § 12-1621 et seq.

§ 12. Charges for service; discrimination; free or reduced rate transportation

Section 12. All charges made for service rendered, or to be rendered, by public service corporations within this State shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of free or reduced rate transportation may be authorized by law, or by the Corporation Commission, to the classes of persons described in the Act of Congress approved February 11, 1887, entitled An Act to Regulate Commerce,¹ and the amendments thereto, as those to whom free or reduced rate transportation may be granted.

¹ 49 U.S.C.A. §§ 1(7), 22.

Cross References

Discrimination between persons, localities or classes of service as to rates, charges, service or facilities prohibited, see A.R.S. § 40-334.

Persons who may be given free or reduced rates, see A.R.S. § 40-335.

Rates and rate schedules, generally, see A.R.S. § 40-361 et seq.

Law Review Commentaries

Racial segregation, *Plessy v. Ferguson*.
Paul Oberst, 15 *Ariz.L.Rev.* 389 (1973).

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1. In general

In the case of *State v. Tucson Gas, Electric Light & Power Co.* (1914) 15 *Ariz.* 294, 138 P. 781, the court said:

"Sections 8 and 9 do not, in the least, limit the 'full power' of the Constitution to

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fix rates and charges and classifications for public utilities, as they only undertake definitely to name instances in which the action and conduct of such corporations must conform to 'such rules and regulations as shall be prescribed by the Corporation Commission, or by law,' and the exception in section 12 emphasizes the general rule of exclusive power in the Commission to fix rates, charges, and classifications."

2. Discrimination

Shareholders of water users' association residing in area furnished electricity by utility were not customers of association as to electricity and therefore obligation of a public service corporation to provide nondiscriminatory rates to its customers did not preclude association and power district, which furnished electricity to most association members, from reimbursing only shareholders residing in area served by utility for excess paid to utility for power over that paid by shareholders furnished power by district. *Miller v. Salt River Val. Water Users' Ass'n* (1970) 11 Ariz.App. 256, 463 P.2d 840.

An electric cooperative, having applied for and received from the state a certificate of public convenience and necessity, and having undertaken to serve thereunder, may not arbitrarily refuse membership to an applicant who qualifies, nor may it discriminate between members as to service, nor place restrictions on membership inimical to its role as a "public service corporation" which implies service to the public. *Application of Trico Elec. Co-op., Inc.* (1963) 92 Ariz. 373, 377 P.2d 309.

Public service corporations must treat all their consumers fairly and without unjust discrimination and give all of them the same service on equal terms at uniform rates without discriminating between customers similarly situated as to character of service rendered or charges made and as regards discrimination in rates or service in the public utility field, a municipal corporation stands in the same position as a private corporation. *Town of Wickenburg v. Sabin* (1949) 68 Ariz. 75, 200 P.2d 342.

§ 13. Reports to commission

Section 13. All public service corporations and corporations whose stock shall be offered for sale to the public shall make such reports to the Corporation Commission, under oath, and provide such information

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A requirement by a public service corporation that its patrons furnish a depository guarantee as security for payment of future service, constitutes improper discrimination when it is enforced against some and not against all of its patrons. *Id.*

3. Reduced rates and fares

Carrier must charge same rate for same service, regardless of reasons for shipment or commodity's ability to stand charges. *Southern Pac. Co. v. State Corporation Commission* (1931) 39 Ariz. 1, 3 P.2d 518.

General Order 70A of the corporation commission, under Laws 1919, Ch. 130 (repealed), the automobile transportation regulation law, providing that the fare for rent service on stage lines was not to be less than 140 percent of the regular scheduled fare, did not conflict with this section, as requiring a discrimination for the same service. *Haddad v. State* (1921) 23 Ariz. 105, 201 P. 847.

State corporation commission lacked authority to authorize a lower rate for public utilities to natural persons who are living on pensions, welfare, or relief and who are over 65 years of age. *Op.Atty.Gen.* No. 63-2.

4. Judicial review

Charges in complaint that order of corporation commission violated this section and Const. Art. 2, §§ 3, 4, and 14 relating to due process and powers of commission, and granted a rate increase without first determining a fair rate of return based on finding of fair value, were sufficiently alleged in petition for rehearing to entitle complainant to rely on such charges in superior court, but charge of discrimination against customers of a public utility and other public service corporations by unlawful delegation of discretionary authority to the utility, was not sufficiently alleged in petition for rehearing, except as to charge that order was discriminatory and would deny use of gas service to certain members of public, and such charge could not be relied on in superior court. *State ex rel. Church v. Arizona Corp. Commission* (1963) 94 Ariz. 107, 382 P.2d 222.